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In Defense of Sausage Reform: Legislative Changes to Civil RICO

Geoffrey F. Aronow*

I. The Best Defense Is a Good Defense

For more than five years, a coalition of business and labor organizations of virtually unprecedented breadth¹ has worked hard to convince Congress to reform the civil provisions of the Racketeer Influenced and Corrupt Organizations section of title 18.² Professionals, businesses, and labor unions suddenly found themselves defendants in treble-damage RICO actions³ arising out of events that had always been the subject of litigation under longstanding and well understood common law and statutory causes of action—securities, breach of contract, negligence, labor, and so on.⁴ RICO suddenly raised the financial stakes in these cases. Moreover, these defendants found themselves on the short end of

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1 The members of the coalition, officially named the Business-Labor Coalition for RICO Reform, include: the AFL-CIO, ACLU, ABA, Alliance of Am. Insurers, American Bankers Assoc., American Council of Life Ins., American Inst. of CPAs, American Fin. Servs. Assoc., Credit Union Nat'l Assoc., Grocery Mfrs. of Am., Independent Bankers Assoc. of Am., National Auto. Dealers Assoc., National Assoc. of Mfrs., Securities Indus. Assoc., State Farm Ins. Cos., and United States Chamber of Commerce.

2 18 U.S.C. §§ 1961-1968 (1988).

3 Section 1962 of Title 18 sets forth various ways that a defendant can "violate" RICO. Section 1964(c) in turn provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore . . . and shall recover threefold the damages he sustains and the suit, including a reasonable attorney's fee."

4 In the mid-1980s, the American Bar Association formed a special committee to evaluate civil RICO and recommend changes in the law, if necessary. The Committee found that three percent of civil RICO cases were decided prior to 1980, two percent were decided in 1980, seven percent in 1981, thirteen percent in 1982, thirty-three percent in 1983, and forty-three percent in 1984. *Report of the Ad Hoc Civil RICO Task Force*, 1985 A.B.A. SEC. CORP. BANKING & BUS. L. 55 [hereinafter *Civil RICO Task Force Report*]. The Administrative Office of the United States Courts ("AO") has begun tracking civil RICO filings to a limited extent in recent years. It has recorded approximately 1000 new cases annually. See *Hearings on H.R. 1046 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989) (remarks of Congressman William J. Hughes, Chairman, Subcommittee on Crime, House Judiciary Committee (Nov. 10, 1989)), reprinted in Hughes, *RICO Reform: How Much Is Needed?*, 43 VAND. L. REV. 639, 644 (1990) [hereinafter Hughes Speech]. Because of the limitations of the civil docket cover sheet, by which the AO gathers this type of data, there is every reason to believe that the AO's number dramatically understates the actual number of federal filings that include civil RICO causes of action.

The ABA Task Force also found that the essential allegations underlying RICO claims broke down as follows: 40% securities fraud; 37% common law fraud in a commercial setting; 4% anti-trust or unfair competition; 4% bribery or commercial bribery; 3% other fraud; 2% labor disputes; 1% theft or conversion; and 9% offenses commonly associated with professional criminal activity. *Civil RICO Task Force Report*, *supra* at 55-56.

news stories and other forms of public attention in which they were being labelled "racketeers."⁵

This public branding and increased financial exposure did not sit well with them for obvious reasons. But these defendants also felt themselves ambushed because they could not understand how this racketeering statute became the bane of their existence. Indeed, it is hard to find anyone who thinks RICO was created as a weapon to be used in the wide variety of civil cases in which it began to appear.⁶

At first, the victims of civil RICO placed their faith in the courts to right this obvious wrong. There was a visceral reaction from both sides of the bench that RICO should not work a hardship on defendants in ordinary civil litigation. Lawyers and judges began to cast about for theories with which to limit its availability. The most direct, although also the crudest limitation, was the "organized crime" nexus requirement—under which some courts dismissed all RICO claims in which the judge could not find a connection to "organized crime."⁷ Other courts limited RICO actions by focusing on the nature of the injury alleged. Still other courts concluded that the plaintiff had to plead some form of "competitive injury" to have a valid RICO case, while some jurisdictions adopted the broader, but less coherent, "racketeering injury" test.⁸ The former required the plaintiff to show that it was injured in its ability to compete in the commercial marketplace;⁹ the latter permitted a broader set of claims, but still required that the plaintiff be able to demonstrate some separate injury caused by the violation of RICO itself, rather the injury caused by the so-called "predicate acts."¹⁰

These and other limiting concepts found adherents at various levels of the federal courts.¹¹ The most dramatic concept, however, came out of the Second Circuit, where, in *Sedima, S.P.R.L. v. Imrex Co.*,¹² the court found a "prior-criminal-conviction" requirement in the words and purposes of the statute. Under the court's analysis, a plaintiff could not proceed under civil RICO unless the defendant had first been convicted

5 See, e.g., Granelli, *Suit Accuses Saudi European Bank of Racketeering*, L.A. Times, Sept. 25, 1990, at D5, col. 2; Wolff, *Racketeering Suit Against Carpenters Chief*, N.Y. Times, Sept. 7, 1990, at B1, col. 2; Woodyard, *Credit Card Firms Sue National Telemarketers; Visa, Mastercard Seek Millions in Alleged Fraud, Racketeering*, Washington Post, July 6, 1990, at C3.

6 The obvious exception to this statement is Professor G. Robert Blakey, who has written and spoken widely in defense of civil RICO's broad application. See, e.g., Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980).

7 See, e.g., *American Sav. Ass'n v. Sierra Fed. Sav. & Loan Ass'n*, 586 F. Supp. 888, 889 (D. Colo. 1984).

8 See, e.g., *Harper v. New Japan Sec. Int'l Inc.*, 545 F. Supp. 1002, 1006 (C.D. Cal. 1982) (racketeering injury); *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207 (N.D. Ill. 1980) (competitive).

9 See *North Barrington Dev., Inc.*, 547 F. Supp. at 210-11.

10 See, e.g., *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 494-96 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985). Section 1961(1) defines "racketeering activity" by referencing a long list of federal and state offenses. Every violation of RICO requires proof of a "pattern of racketeering activity." See 18 U.S.C. § 1962 (1988). The offenses listed in § 1961(1) are commonly referred to as RICO's "predicate acts." See D. SMITH & T. REED, *CIVIL RICO* ¶ 20.1 at 2-2 (1990).

11 See *supra* notes 7-10; see also *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1393-405 (E.D.N.Y. 1989).

12 See *supra* note 10.

either of an underlying "predicate act" or of RICO itself in connection with the conduct underlying the plaintiff's claim.¹³

The potential relief provided for defendants by this analysis was short-lived, however. *Sedima* became the first civil RICO case that the United States Supreme Court reviewed, and the Court reversed the Second Circuit.¹⁴ The most interesting aspect of that decision was not the outcome, but the vote. Only a bare majority of five supported reversal. Justice Marshall wrote the dissent, and Justices Brennan, Blackmun and Powell joined him.¹⁵

Marshall used his dissent to warn of the pernicious impact that RICO had, and would continue to have, on ordinary litigation and carefully-crafted federal systems, such as those that govern the securities markets.¹⁶ Even the majority appeared to sympathize with the plight of defendants who suddenly found themselves at the wrong end of a RICO shotgun barrel.¹⁷ The majority, however, adhered to the reigning philosophy that the Court should not work to stretch statutory language to match statutory intent; rather, as the Court stated, if there were defects in civil RICO, they were "inherent in the statute as written" and their "correction must lie with Congress, not in the courts."¹⁸

In the wake of *Sedima*, the hope of help through judicial interpretation faded, and victims of civil RICO focused their attention towards Congress. They were hopeful, in light of the sentiments reflected in the *Sedima* decision and in other court rulings, that Congress would quickly respond to the dilemma it had inadvertently created and reform the civil provisions of the statute.

Indeed, initially, success looked like it would be quickly achieved. In 1985, Representative Rick Boucher (D-VA) introduced a bill that would have added a prior-criminal-conviction requirement to the civil provisions of RICO.¹⁹ The bill quickly garnered 151 cosponsors in the House of Representatives.²⁰ For a variety of reasons, however, the proposal was tied up in a subcommittee of the House Judiciary Committee to which it was assigned. Five years later, a complex series of events have conspired to result in the promise of civil RICO reform remaining unfulfilled.²¹

13 *Sedima*, 741 F.2d at 496-504. The court also concluded that civil RICO could be used only to remedy "racketeering injury."

14 473 U.S. 479 (1985).

15 473 U.S. at 500. Justice Powell also wrote a separate dissenting opinion. *Id.* at 523. The majority held that the Second Circuit was incorrect both in requiring a prior criminal conviction and in requiring a "racketeering injury" separate from the injury caused by the predicate acts. *Id.* at 486-500. See *supra* note 10. The dissent would have upheld the Second Circuit on the "racketeering injury" requirement and therefore did not reach the "prior criminal conviction" requirement. *Id.* at 508-523.

16 *Id.* at 501-107.

17 *Id.* at 500.

18 *Id.* at 499-500.

19 H.R. 2943, 99th Cong., 1st Sess. (1987).

20 132 CONG. REC. E3530, 3531 (daily ed. Oct. 10, 1986) (remarks of Rep. Boucher).

21 In brief, on the eve of mark-up scheduled for October 10, 1985, Public Citizen wrote to the Chairman of the Subcommittee on Criminal Justice, John Conyers (D-MI), and indicated it had serious reservations about the legislation. Thereafter, Chairman Conyers refused to mark-up the legislation, which a majority of the subcommittee had cosponsored. He finally acceded to pressure to permit the bill to move forward late in the second session of the 99th Congress, and the House

Several of the later proposals, those put forth by Representative Conyers and some others,²² were really wolves—designed to expand the intrusions of civil RICO into ordinary civil disputes—dressed in the sheeps' clothing of "reform." The true reform proposals, however, have grown more complex. Starting from the simple, short, and easy-to-comprehend prior-criminal-conviction bill, negotiations produced a more complex structure keyed to alterations in the remedies, preserving automatic treble damage actions for some plaintiffs, potential for multiple damages for others, and single damages actions—with or without attorney's fee awards—for yet others.²³ The categories of plaintiffs, the exceptions, the exceptions to the exceptions, have all evolved over the years, to the point where the latest iteration of that proposal runs over 11 pages.

Recently, moreover, a new concept has emerged—the so-called "gatekeeper" process promoted by William Hughes (D-NJ), chair of the subcommittee²⁴ that is now handling RICO.²⁵ That proposal focuses on a whole separate set of considerations and concepts designed to place responsibility for separating out "appropriate" from "inappropriate" civil RICO cases in the hands of judges. This new approach to reform promises to create many new issues of its own.²⁶

Over the years, advocates of civil RICO reform have been put on the defensive by finding themselves defending this evolving "sausage." The current legislative proposal is, indeed, a complicated product of five years of searching for the middle ground between the purity of logically consistent policy choices and the pressures of political reality.

For example, the Senate bill provides that claims arising from behavior otherwise covered by the securities laws will be single-damage claims.²⁷ However, there is an exception to that limitation for "insider

passed it by an overwhelming margin. However, it was so late in the session that the only hope of passage in the Senate was to attach it as an amendment to the "continuing resolution" to provide funds for the federal government to keep operating. The Senate voted on that amendment in the late hours on the next to last day of the session, and the amendment failed by three votes. During the 100th Congress, the Senate Judiciary Committee eventually reported out a civil RICO reform bill, S. 1523, 100th Cong., 2nd Sess. (1988), by a vote of 11-2, but that bill became hostage to battles over judicial nominations and other committee issues and never reached the floor of the Senate for a vote. During the current Congress, the Senate Judiciary Committee again voted out a civil RICO reform bill, S. 438, 101st Cong., 1st Sess. (1989) [hereinafter S. 438], by a vote of 11-2 that was substantially similar to the previous bill it approved.

22 For instance, in the 99th Congress, H.R. 4892, 99th Cong., 1st Sess. (1987); H.R. 5290, 99th Cong., 1st Sess. (1987) and H.R. 5391, 99th Cong., 1st Sess. (1987).

23 See S. 438, *supra* note 21, § 4 (amending 18 U.S.C. § 1964(c)).

24 Prior to the 101st Congress, the Criminal Justice Subcommittee was handling the civil RICO reform legislation. In the 101st Congress, Jack Brooks (D-TX) replaced Peter Rodino (D-NJ) as Chairman of the Judiciary Committee (Rodino did not stand for reelection to Congress), and Brooks chose to refer the civil RICO legislation to the Subcommittee on Crime, chaired by Hughes. Ironically, in light of Conyers' resistance to civil RICO reform, the Subcommittee on Criminal Justice is no longer chaired by Conyers (who gave up the chair when he became Chairman of the Government Operations Committee) but by Charles Schumer (D-NY). No one knows what civil RICO's fate might have been in the Criminal Justice Subcommittee under the direction of its new Chairman.

25 See H.R. 5111, 101st Cong., 2nd Sess. (1990) [hereinafter H.R. 5111].

26 H.R. 5111, *supra* note 25, as introduced. Among the issues it poses are the meaning of "extraordinary remedy," *id.* at § 3, and "deter" *id.* at § 5.

27 The provision that would otherwise provide for multiple damages for private citizens in securities litigation requires a showing that "neither state nor Federal securities laws make available an

trading.”²⁸ That exception is in the bill for one reason—concern about the political impact of the public scandals in recent years over insider trading. Members of Congress are concerned that they not create an opportunity for their opponents to take easy pot shots at them. They believe that doing something that can be characterized as assisting inside traders would strike a particularly responsive—and negative—chord with the public today. While they might admit readily that reform that touches upon insider trading cases is valid as a matter of policy, they are not willing to face the simple and sexy contrary political attack.²⁹ There are few who would argue that the “insider trading” provision is consistent with the structure and approach of the RICO reform bill. Dictated by political realities, however, it is there to stay.³⁰

The most significant example of this compromise of policy with political reality is the structure of the bill itself. The core of the bill would alter the remedies in order to limit the incentives to misuse civil RICO, and the centerpiece of which is multiple damages for consumer causes of action.³¹ That is there, ironically, because it was the price that Public Citizen and USPIRG³² demanded in 1986 to support RICO reform at a time when Representative John Conyers (D-MI), the chair of the House subcommittee that had jurisdiction over RICO reform, was holding up the legislation at their behest. If they were satisfied, Congress was likely to enact civil RICO reform because there was no other significant opposition to the prior-criminal-conviction requirement, let alone a more watered-down provision likely to emerge from negotiations with Public Citizen and USPIRG.

In fact, the bill so negotiated passed the House overwhelming at the end of the 99th Congress.³³ It failed in the Senate by three votes in the closing hours of the Congress literally at 2:00 a.m., for reasons that had

express or implied remedy for the type of behavior on which the claim of the plaintiff is based.” See S. 438, *supra* note 21, § 4. Under the proposed legislation, the only remaining circumstance under which a private citizen could sue for multiple damages under RICO in a securities case would be where the defendant has been criminally convicted of a felony in connection with the conduct that underlies the plaintiff’s civil claim. *Id.*

28 See S. 438, *supra* note 21, at § 4.

29 A sense of what members of Congress are concerned about is provided by the attacks that Public Citizen launched during 1989 and 1990 against Senator DeConcini for his support of the civil RICO bill in the Senate. Even though Senator DeConcini had been a supporter of RICO reform long before Charles Keating became a target of RICO litigation, Public Citizen used the public links between Keating and DeConcini to suggest repeatedly that the Senator was supporting RICO reform to bail out Keating. While the strategy backfired and caused Senator DeConcini’s Judiciary Committee colleagues to rally to his defense, it is this type of easy, cheap shot that many members worried would be taken at them if RICO reform even incidentally “helped” inside traders.

30 Similarly, during mark-up, the Judiciary Committee added a provision to H.R. 5111 to create a presumption concerning matters related to defunct savings and loans. This provision was inconsistent with the overall structure of the proposal, and was added simply to protect members from an unfair but powerful political attack based upon characterizing civil RICO reform as a “boon” for “S&L crooks.” See *supra* note 29.

31 See S. 438, *supra* note 21, at § 4.

32 “USPIRG” stands for United States Public Interest Research Group. USPIRG, along with Public Citizen, is organized by, and still more or less formally under the control of, Ralph Nader.

33 See *supra* note 21. Public Citizen and USPIRG subsequently repudiated the compromise bill they negotiated and have stood in opposition to all efforts at reform since that time.

absolutely nothing to do with the RICO reform in general or the central elements of the proposal in particular.³⁴

Indeed, the "sausage-like" qualities of the current proposal led Congressman Hughes to conclude that while civil RICO needs substantial reform, the previously negotiated bill did not address the issues directly or as effectively as it should.³⁵ He has engaged in a nine-month process in which he and his staff first grappled with both the substantive and political difficulties with some of the approaches that, at first blush, strike any observer as the most direct method for fixing civil RICO—such as altering the definitions of "pattern" or "enterprise."³⁶ More recently, he has turned his attention to formulating the "gatekeeper" provision, whereby a judge would examine the RICO claim, and applying a set of broadly worded criteria, try to determine whether the claim is the type that Congress wants litigated under RICO—even if the plaintiff meets all the other pleading requirements under the statute.³⁷

H.R. 5111 has hardly solved all the difficulties that the politics surrounding civil RICO reform have engendered in the past. And, it is reasonable to conclude that Representative Hughes has come to recognize the difficult chain of reasoning that led to the current proposal and the complexity of the problem and the convolution of the politics surrounding it.

All of the concern about how the political process got to where it is today, however, ignores the impetus behind civil RICO reform in the first place—whether the statute as it has come to be applied makes any sense as a matter of policy rather than a matter of politics. The answer to that question remains "no."

II. Rationales for Civil RICO

To understand why the answer is "no" one must examine the rationales that are offered in support of the present system of liability under civil RICO. There are, in turn, really two separate branches to that inquiry—consideration of the rationale at the time the statute was enacted and consideration of the rationale today, if any, to the extent that they might differ from the original intent.

34 *Id.* Some Senators were opposed philosophically to appending substantive legislation to continuing resolutions. Some opposed RICO's appearance as a "midnight amendment." There was also some opposition generated by a few large municipalities did not want their ability to win automatic treble damage actions to be disturbed, at least for pending cases. Any one of these could have accounted for the switch of the two votes that spelled the margin between passage and defeat: there is no doubt that the combination of all three caused RICO reform's defeat in the Senate.

35 See Hughes Speech, *supra* note 4, at 646-48.

36 See *supra* note 26. The bill that Representative Hughes eventually cosponsored, H.R. 5111, does not contain an amendment of the definition of "pattern." It is designed simply to codify existing law, not to focus civil RICO's use on appropriate cases. See *id.* at 647.

37 *Id.* See also Lacovara & Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provision of Private Civil RICO*, 21 NEW ENG. L. REV. 1 (1985-1986).

A. *The Rationale in 1970*

1. Congress' Original Intent

There is no point in repeating the debate over Congress' intent when it enacted RICO. In my view of the legislative history,³⁸ the events leading up to enactment of title IX of the Organized Crime Control Act of 1970, and its antecedents, going back even to the Kefauver hearings and the Katzenbach Report, confirm that the thrust of the legislative effort was to provide legitimate businesses with a weapon to use when they were injured economically by the infiltration and use of legitimate businesses by organized, professional criminals.³⁹

RICO was intended to create a new remedy that would fill in the interstices in existing civil suits and thereby provide a follow-up private remedy to complement and enhance the primary focus of the Organized Crime Control Act in general and RICO in particular: increased activity by and effectiveness of federal law enforcement agencies. RICO simply was not designed to create a new weapon to use in cases already covered by statutory and common law causes of action. Yet, that is how it is used in the vast majority of cases.⁴⁰

Under this view of RICO, the archetypal RICO case is one brought by beer distributor *A*, whose business has been destroyed because a rival distributor in town has been taken over by organized crime. Beer distributor *B*, through the use of threats of violence and perhaps actual incidents of violence, has persuaded all of the taverns in town to cease doing business with beer distributor *A* and to do business with it instead.

The record suggests that this was the image most members had in mind when they considered this legislation.⁴¹ The analogies to the Clayton Act drawn by some at that time provide strong evidence that Congress viewed RICO as a remedy for the competitive and other business-related injury caused by the unfair tactics of organized crime operating in

38 In the early 1950s, a special Senate Committee chaired by Senator Estes Kefauver held hearings and issued a report on organized crime. See S. REP. NO. 307, 82d Cong., 1st Sess. (1951). The Kefauver Committee recommended additional crime legislation and prosecutorial action at the federal and state levels. *Id.* at 6-11. The origins of RICO can be traced to the 1967 report issued by President Johnson's Crime Commission, chaired by Attorney General Nicholas Katzenbach. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967). The Report emphasized the problems presented by the infiltration of legitimate businesses by professional criminals and identified the principal methods by which the infiltration occurred in language that is echoed in RICO's provisions. Compare *id.* at 190 with 18 U.S.C. §§ 1962(a)-(b) (1988). Neither the Kefauver Committee nor the Katzenbach Report suggested that private lawsuits were a necessary or even appropriate part of the solution to the organized crime problem.

39 See Lacovara & Aronow, *supra* note 37, at 1-2, 5-9.

40 See *Civil RICO Task Force Report*, *supra* note 4, at 53-54. Ironically, in the wake of the United States Supreme Court's decision in *Sedima* rejecting a "racketeering injury" requirement, many courts have held that RICO *cannot* be used to remedy so-called "indirect injuries," but may *only* be used to collect damages for injuries caused by the predicate acts themselves. See, e.g., *Morast v. Lance*, 807 F.2d 926, 932-33 (11th Cir. 1987) (Civil RICO claim rejected where alleged injury "did not flow directly from the predicate acts.") Thus, the courts' struggle to make sense of this statute has led many of them to make it available only in those situations Congress did *not* intend it to be used and to bar its use to redress those injuries for which Congress created it.

41 Lacovara & Aronow, *supra* note 37, at 7-8.

the legitimate marketplace.⁴² This view also explains why Congress passed legislation that may in fact federalized the law of fraud.⁴³ The members viewed the private remedy, to the degree they thought about it at all, as merely filling in one small but significant interstice in the law. They sought to provide a remedy to a class of victims who were otherwise without one. They certainly did not view civil RICO as a new weapon in the hands of the plaintiff's bar for dramatically increasing the settlement value of cases that were already being litigated under existing statutory or common law schemes.⁴⁴

The other critical element of the history of civil RICO that is not subject to much dispute is that Congress struggled with the task of defining organized crime, abandoned that effort, and decided instead to try to set forth in broad outline certain characteristics of organized crime.⁴⁵ RICO's broad sweep also resulted from the desire to avoid forcing law enforcement officials to return to Congress for new legislation every time they came up against new forms or manifestations of the involvement in organized crime in legitimate business.⁴⁶ At the time, broad language was being considered, Congress was counting on prosecutorial discretion to limit its use.⁴⁷ Obviously, Congress went well beyond the archetypal Mafia beer man with a baseball bat in defining the "predicate acts" for RICO violations. This reflected the effort Congress made to sweep in areas in which organized crime was already operating or might be operating in the foreseeable future.⁴⁸

For instance, as Arthur Mathews explained during his presentation at this symposium,⁴⁹ the addition of "fraud in the sale of securities" to the list of civil RICO predicate acts⁵⁰ was not done with the intention that every civil securities fraud case where the plaintiff is willing to allege criminal conduct would become a treble-damage action. Indeed, it was added at a time when the bill had no private cause of action. Congress

42 See *Agency Holding Co. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987). Those who seek a broad interpretation of RICO embrace the Clayton Act analogy quite often, see, e.g., 133 CONG. REC. E3351 (daily ed. Aug. 7, 1987) (remarks of Rep. Conyers) (treble damage provision modeled on antitrust laws); *RICO Reform Act: Hearings on H.R. 1046 Before the House Committee on the Judiciary*, 101st Cong., 1st Sess. 14 (July 20, 1989) (testimony of Prof. G. Robert Blakey on H.R. 1046) ("RICO and the antitrust statutes are well integrated") [hereinafter Blakey Testimony], although they do not like it much in this context, see, e.g., *id.* at 8.

43 Indeed, because of the broad interpretations the federal courts have given the federal mail and wire fraud statutes, RICO not only federalizes private damage actions for fraud but greatly expands their availability. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 502 (1985).

44 It is in the context of this understanding of RICO that there is indeed a strong rationale for finding in the language of the statute a requirement for "competitive injury" and even for a prior criminal conviction." See Brief of the American Institute of Certified Public Accountants as Amicus Curiae in Support of Respondents, *Sedima* (No. 84-648).

45 See Brief of the American Institute of Certified Public Accountants as Amicus Curiae in Support of Respondents, *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989) (No. 87-1252) [hereinafter *H.J. Inc. Amicus Brief*].

46 Lacovara & Aronow, *supra* note 37, at 8.

47 *Id.*

48 See *supra* note 42.

49 See Mathews, *Shifting the Burden of Losses in the Securities Markets: The Role of Civil RICO in Securities Litigation*, 65 NOTRE DAME L. REV. 896, 927-29 (1990). See also *Civil RICO Task Force Report*, *supra* note 4, at 99-100 n.30.

50 18 U.S.C. § 1961(1)(D) (1988).

added it at the behest of the SEC, which was looking for new authority in light of its concern that organized crime was getting heavily involved in the trafficking of stolen and counterfeit securities.⁵¹

While there are indeed comments in the legislative history concerning the statute's application to "organized crime-like behavior,"⁵² and express recognition—mostly from the bill's opponents and mostly fueled by distrust of prosecutors—of the weapon Congress was creating by the breadth of the language,⁵³ there is no indication that these statements were meant to serve other than as statements of self-evident reality. The overwhelming thrust of the legislative history teaches that Congress was enacting a statute which would be used to fight organized crime's impact on legitimate enterprise.⁵⁴

2. The Importance of Original Congressional Intent: Allocating the Burden of Persuasion

Some argue that original congressional intent is beside the point, and that Congress should consider the wisdom of preserving this statute today, whether or not its impact has been fortuitous. The touted wisdom of preserving RICO in its present form is analyzed below. Nonetheless, as a threshold matter, it is important to recognize the flawed premise that underlies the assertion that original congressional intent is irrelevant to the consideration of the issue today.

The flaw stems from the reality of the congressional legislative process. The fundamental reality of that process is that it is a great deal easier to block legislation than it is to pass it. The legislative system is both formally structured in a way that causes that result and informally affected by a variety of factors that reinforce that result.⁵⁵

It is beyond the scope of this symposium to debate the normative value of that reality. It appears to be more good than bad, particularly in light of (1) the limited amount of time and attention any proposal receives from individual legislators, and (2) the opportunity that the pro-

⁵¹ See *supra* note 49.

⁵² See Blakey Testimony, *supra* note 42, at 7-8.

⁵³ Lacovara & Aronow, *supra* note 37, at 29-30 n.188. Fifteen years later, Congressman Mikva, now a judge on the United States Court of Appeals for the District of Columbia Circuit, reported to Congress,

I stand amazed . . . to realize that my hyperbolic horrible examples of how far the law would reach pale into insignificance when compared to what has actually happened. . . . What started out as a small cottage industry for federal prosecutors has become a commonplace weapon in the civil litigator's arsenal. . . . The civil RICO provision's use as a weapon in various sorts of commercial disputes is, to my mind, both improper and an acute embarrassment to all concerned.

Hearings on Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. 1-2 (Oct. 9, 1985).

⁵⁴ Lacovara & Aronow, *supra* note 37, at 7-8.

⁵⁵ For instance, the committee system allows individual members of Congress to prevent legislation from moving forward—as Representative Conyers did with RICO reform in the 99th and 100th Congress. Similarly, a Senator's ability to place a "hold" on legislation—indicating an intention to filibuster the bill if it comes to the floor—can effectively prevent legislation from coming up for debate by the full Senate. On the informal side, the tendency of Congress to focus its attention on a few publicly prominent issues at any time can make it very difficult to get the time and attention necessary to move through less visible legislation.

cess of delay provides for repeated examination of an issue over time and in evolving circumstances. That tentative view is offered with full consciousness of the reality that civil RICO reform has floundered precisely upon those same rocks.

In any event, this reality means that the system is not a balanced one. In a system where it is no more difficult to get legislation passed than it is to stop legislative action, the question of intent in earlier enactments might not be significant. One could simply ask the legislature to examine whether it was happy with the way the law had actually evolved, confident both that the body would either correct or accept that outcome on the merits, and that the outcome would not be skewed by the serendipity of whether action or inaction was required to reach the desired result.

The fact that the system is not so balanced, however, makes Congress' original intent important. It dictates who should have the burden of persuasion today. If the law in question is merely being used in the manner intended, although the attitudes about that use may have changed, then it is appropriate that those seeking change must shoulder the burden of substantive persuasion. But if a statute is being used in wholly unintended ways, then a concern for legislative integrity would dictate that the statute should be confined to its intended purposes. Those who would like to see legislation in place that serves the unintended uses to which the existing statute has been put should carry the burden of persuading the legislative body to address their concerns through direct, affirmative legislation.

While this distinction may seem highly theoretical, it is in fact the issue that provides the subtext to the whole civil RICO reform debate. Those who have inadvertently benefitted from civil RICO's unintended uses are not defending the statute today because they believe that the statute is a well-crafted and precisely-focused vehicle for attacking the problems with which they are concerned. Indeed, it is hard to imagine anyone thinking that RICO's cumbersome structure and hidden minefields embodies the federal remedy they would propose for consumer fraud, securities fraud or contractual disputes. Nor do they seek the preservation of civil RICO in its present form because they really believe that the businesses that they are suing are the type of "criminals" that Congress foresaw as the targets of RICO suits—whether or not you concede that Congress understood that organized criminals also wear Brooks Brother suits and white collars on occasions.⁵⁶ Rather, they are quite understandably loathe to give up a weapon that Congress accidentally handed them and which they do not believe that Congress would create through direct amendments to the statutes governing the substantive area in which they want to use RICO.

⁵⁶ See *Hearings on Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 35 (July 30, 1985) (Statement of the National Association of Attorneys General and National District Attorneys Association) ("Victims of crime rightly care little that their life savings were taken by mobsters wearing black shirts and white ties or crooked accountants wearing Brooks Brothers suits and white collars."); 133 CONG. REC. H9052 (daily ed. Oct. 27, 1987) (remarks of Rep. Conyers) ("Victims of such crime care little that their life savings are stolen by mobsters wearing black shirts and white ties or by accountants while dressing in Brook Bros. suits and white collars.").

While this may explain the political reality behind the defense of civil RICO, it does not provide a firm policy ground on which to defend the preservation of the statute. It is to the proffered policy grounds that we now turn.

B. *The Rationales Today*

1. The Double-Breasted Suit and Black-Collar Targets of Civil RICO

One potential defense of civil RICO must come from an examination of those who are sued under the statute today. Based on its actual targets, is there much to be said for civil RICO as a remedy for the societal ills it was created to correct?

First, let us consider its use as a weapon against those who everyone agrees were among its intended targets; those bad actors that fall within commonly held notions of organized crime.⁵⁷

Everyone concedes that the statute does not provide an effective weapon for private parties to sue that type of defendant. The reasons are self-evident. The government itself has a difficult enough time mounting cases against organized crime, despite the investigatory tools at its disposal.⁵⁸ It borders on the absurd to think that a private citizen would have the resources, the necessary access to information and cooperative witnesses, or the temerity to sue serious organized crime figures—absent at least prior government prosecution.⁵⁹

Even if potential plaintiffs were prepared to use the statute in such cases, if professional criminals were the intended targets of the statute, liability should turn on whether the conduct alleged was “typical” or “characteristic” of the methods by which the defendant individual or organization conducted its affairs.⁶⁰ That standard would focus the use of the statute on professional criminals, those whose business was crime or conducted their business through consistent uses of crime. The standard should not create a status offense. That formulation would eliminate

57 It is beyond cavil that the original idea that evolved into RICO was to create legislation that would attack the La Cosa Nostra and similar professional criminal organizations. *H.J. Inc. Amicus Brief*, *supra* note 45, at 8-9. However, Congress abandoned efforts to identify “organized crime” directly, fearful that any definition would violate the constitutional prohibition of status offenses. *Id.* at 9-10.

58 Indeed, on the criminal side, RICO arguably has provided federal prosecutors with an important weapon for attacking organized crime. See *Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 2-9 (May 4, 1989) (statement of John C. Keeney, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice). The use of criminal RICO by federal prosecutors, however, has not been without its critics. See, e.g., Crovitz, *Milken's Tragedy: Oh How the Mighty Fall Before RICO*, *Wall St. J.*, May 2, 1990, at 17.

59 The statistics bear this out. Very few civil RICO damage actions have been brought in situations involving traditional organized criminal conduct. *Civil RICO Task Force Report*, *supra* note 4, at 53-54. In many of the cases in which it has been used against professional criminals, moreover, there has been a prior criminal prosecution of the defendant. See *Lacovara & Aronow*, *supra* note 37, at 14.

60 The reference to the conduct of affairs is not meant to suggest that this standard could only apply to violations of 18 U.S.C. § 1962(c). The same approach would have the factfinder consider in a § 1962(a) action whether the conduct by which the defendant obtained the proceeds was typical of how he obtained proceeds to invest in the enterprise, and, in a § 1962(b) action, whether the conduct was typical of how the defendant obtained or maintained control of the enterprise.

civil RICO's present defect of sweeping in every modern business relationship in which a plaintiff is willing to plead criminal fraud.⁶¹

2. The Single-Breasted and White-Collar Targets of Civil RICO

Common notions of organized crime are not the springboard for the case being made today for preserving civil RICO more or less in its current form. Nor do such notions make a case, as Professor Blakey has advocated over the years while wearing a variety of hats,⁶² for strengthening the weapons civil RICO places in the hands of plaintiffs. Instead, that case can be summed up as follows: White collar-crime is rampant in this country today. Depending on who is talking, that is followed by reference to a particular concern—penny stock fraud, savings and loan misfeasance, or insurance company failures concealed and deepened, if not caused, for evil purposes.⁶³ The remedies, the argument continues, to which our nation has traditionally looked to police and compensate victims in these areas have not stopped this tide.⁶⁴ Moreover, the unavailability of multiple damages, and, in most cases, attorney's fees or federal jurisdiction under the existing civil remedies, not only inhibits private parties from pursuing compensation, but means that, in the end, evildoers know that, at worst, they will merely have to give back what they stole, creating no disincentive to steal in the first place.⁶⁵ Therefore, this line of reasoning concludes, the nation needs civil RICO to fight rampant, mostly financial, fraud.

C. *The Rationales for the Future*

Let us unpeel this onion and see if there is anything there that justifies the preservation of civil RICO more or less in its current form as a matter of policy and not simply as a matter of politics.

1. Contention: Automatic Treble Damages Are Necessary to Compensate Victims Fairly and to Punish Wrongdoers

We have developed a system in our law for punishing really bad wrongdoers in civil actions. Its called punitive damages.⁶⁶ In most of the situations in which civil RICO is often used, there are applicable state law causes of action under which punitive damages are available. Provided,

61 In the name of full disclosure, it is necessary to note that, in a brief which the author of this article helped to write, the AICPA argued to the United States Supreme Court, entirely unsuccessfully, that a notion of "typicality" or "characteristic behavior" is already inherent in the statute's requirement of a "pattern" of "racketeering activity." See *H.J. Inc.* Amicus Brief, *supra* note 45, at 6-21; see also *H.J. Inc.*, 109 S. Ct. at 2902-05. Despite the Court's refusal to find that requirement in the statute as it is written today, it remains a logical standard to write into the statute if the objective is to limit civil (and, for that matter, criminal) RICO's reach to common concepts of organized crime.

62 Over the years, in connection with the fight in Congress over civil RICO reform, Professor Blakey has appeared variously as a representative of the state attorneys general, of Representative Conyers, and of himself.

63 See, e.g., Blakey Testimony, *supra* note 42, at 24-27.

64 *Id.* at 15-16.

65 *Id.* at 18-21.

66 See, e.g., RESTATEMENT (SECOND) OF TORTS, § 908 comment b (1976).

however, that there is proof of the kind of egregious misconduct that is asserted as the basis for civil RICO.⁶⁷

The response to this observation is that punitive damages do not provide the certainty of automatic treble damages.⁶⁸ That is both an accurate statement and an unobjectionable fact. If plaintiffs are ultimately unable to prove their allegations that the conduct involved conscious maliciousness⁶⁹—or whatever the particular totem for egregiousness might be applied—then they will not receive extra damages. And why should they? That result would create a much more accurate balance of incentives for pretrial settlement than does RICO's automatic treble damages.⁷⁰

In this same vein, one of the more astonishing arguments in defense of civil RICO's current structure starts with the assertion that studies show that where automatic treble damages are available, defendants tend to pay full actual damages in settlement of cases.⁷¹ Thus, it is argued, it is a "good" thing because it means that "victims" get "fully compensated."⁷² To the contrary, this impact on settlement is powerful proof of the extortive and distortive impact of automatic treble damages.

Those who hail the impact on settlement must begin with the proposition that the plaintiffs should always win and always be awarded in the full amount they claim. For these advocates of treble damages, apparently the trial process is merely a nuisance that delays the appropriate transfer of money, perhaps with the caveat that the plaintiffs' claims should be able to survive pretrial motions practice.

The appropriate stance is, of course, a more neutral one, under which the evaluation of the normative impact of RICO on settlement is based upon the supposition that until a plaintiff proves both liability and damages there is no reason to assume a right to relief. There remains at least *some* possibility that the claim may not be proven—and therefore should not be vindicated—in all its glory.

Starting from that premise, a system of incentives that lead defendants as a regular matter to pay plaintiffs prior to trial the full amount of damages they claim should be condemned, not applauded. RICO's incentives skew the system; they do not vindicate justice.

The convoluted argument in support of the skewing of settlement through the threat of treble damages, moreover, brushes aside the fact that there are often in place federal or state regulatory systems, including provisions for civil remedies, that address indirectly the concerns and is-

67 See, e.g., Complaint, *Curley v. Cumberland Dairy Farms*, 728 F. Supp. 1123 (D.N.J. 1989) (Civ. Action No. 86-5057), reprinted in 5 RICO L. REP. 254 (1987) (asserting, *inter alia*, claims under RICO and claims for punitive damages for intentional torts).

68 See Blakey Testimony, *supra* note 42, at 17-21.

69 See S. 438, *supra* note 21, at § 4.

70 In *Sedima*, speaking of the distortive impact of civil RICO's treble damages and wide-ranging liability, Justice Marshall wrote: "Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit. It is thus not surprising that civil RICO has been used for extortive purposes, giving rise to the very evils it was designed to combat." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1985).

71 Blakey Testimony, *supra* note 42, at 21.

72 *Id.*

sues presented by the substantive area of the law in which the plaintiffs are litigating.⁷³ Some of those statutes do not provide a remedy as draconian as civil RICO.⁷⁴ In which case there is no clear rationale for permitting civil RICO to override the policy choices embodied in those other statutes. The rest of the statutory schemes provide similar⁷⁵ or stronger⁷⁶ remedies, in which case RICO is unnecessary.

2. Contention: Civil RICO Is Needed as a Threat That Will Deter Evil Doers

The notion that the threat of civil RICO is going to deter significant amounts of fraud is nothing more than empty rhetoric. There is already a host of criminal and civil laws on the books, enforced by a wide variety of state and federal agencies, directed at the same type of misconduct.⁷⁷ Despite their limited resources, those government agencies have tools at their disposal that go far beyond those in the hands of private citizens, even those armed with the power of the plaintiff's bar.⁷⁸ Most importantly, the government agencies often have the threat of serious criminal sanctions as well as large financial sanctions—including those provided by RICO—that can go far beyond what a private suit is likely to produce.⁷⁹ Thus, the kind of disincentive for committing fraud that civil RICO is supposed to produce is already there even without civil RICO—if you get caught, you can pay a very large price.

Moreover, it is reasonable to postulate that the kind of white-collar criminals proponents of civil RICO want to target fear jail more than they fear large civil damages. Organized criminals may see jail time as a price of doing business, but I do not think many of the Wall Street or S&L miscreants who are regularly cited as the reason for preserving civil RICO see it that way.

It seems likely—and it would be interesting to know if there is any systematic research on this subject—that people of that type who engage in fraud and other misdeeds generally have the arrogance to believe that they will never be caught. They do not engage in the conduct because they have sat down and conducted a rational cost/benefit analysis of the

73 For instance, the federal antitrust laws, *see* 15 U.S.C. § 15 (1988), the federal securities laws, *see, e.g.*, 15 U.S.C. § 78j(b) (1988), and state consumer protection statutes, *see, e.g.* TEX. REV. CIV. STAT. ANNO. art. 5069-9.01-5-60-9.04 (1986).

74 *See, e.g.*, 15 U.S.C. § 78bb (1988) (limiting total damages available under Securities Exchange Act of 1934 to actual damages).

75 *See, e.g.*, 15 U.S.C. § 15 (1988) (treble damages for any person "injured in his business or property by reason of anything forbidden in the antitrust laws").

76 *See* RESTATEMENT (SECOND) OF TORTS § 908(b) (1976) (punitive damages available where defendant's conduct "is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others"). Punitive damages awards, of course, can vastly exceed treble damages. *See, e.g.*, *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2913 (1989) (upholding jury award of just over \$51,000 in actual damages and \$6 million in punitive damages).

77 Indeed, most of the predicate acts set out in 18 U.S.C. § 1961(1) (1988) have a parallel private cause of action.

78 The most important of those tools are the "pre-complaint" powers of, and resources for, investigation—including subpoena powers, civil investigative demands, grand juries, the FBI, the state bureaus of investigation and the like.

79 *See* Blakey Testimony, *supra* note 42, at 2 (discussing penalties SEC sought from Michael Milken and Drexel Burnham).

risks and the rewards. I doubt there are many potential inside traders who sit back and think, "the U.S. Attorney's office in this district (or the SEC) is overburdened, so I can go ahead with my plan." It seems equally unlikely that they would hesitate any longer because civil RICO is suddenly thrown into a calculus they never made in the first place.

Perhaps the most obvious evidence of this supposition is the "massive fraud" in the United States to which the opponents of civil RICO reform like to point.⁸⁰ Most of it has occurred during a period in which civil RICO's use in general has received wider publicity⁸¹ and in which, in particular, members of the business community have become much more aware of the "threat" it poses.⁸² Yet, where is the deterrence if, as we are told, fraud is growing at an unprecedented rate? Did civil RICO deter the apparently unprecedented fraud in the savings and loan system? Has it put the brakes on penny stock fraud? Has the rate of consumer fraud declined since civil RICO has appeared on the scene? Perhaps the response is that fraud-doers are acting throughout the nation in massive numbers because they are confident that Washington lobbyists would get the law changed before they are ever caught. That is only a slightly more farfetched hypothesis than the hypothesis of deterrence itself.

As in the debate over the death penalty, the promise of deterrence provides a rhetorical opportunity to recite all the horrors that our society faces, and thereby create a link in people's minds between the evil people—be it murderers or white-collar fraud-doers—and the efforts to change the law. But there is no more substantive basis for believing that the threat of civil RICO liability has or will deter the incidence of large-scale fraud in this country than there is to believe that the death penalty deters murder. Indeed, there is probably less.

3. Contention: Civil RICO Is Needed to Overcome the Practical Limitations of Litigating Over Egregious Wrongdoing in Certain Types of Cases

The contention that civil RICO is needed to address practical difficulties in attacking certain forms of egregious misconduct through the courts in turn breaks down into three sub-arguments.

First, the argument takes the form of the flip side of the claim that civil RICO is needed to deter and remedy "massive fraud." Here, the contention is that private plaintiffs need civil RICO to attack the egregious frauds that are devastating to their lives but are too small in absolute terms to attract legal representation.⁸³

The one obvious response to this claim is that, if it is true, then civil RICO's availability should be limited to small cases of a type that nor-

⁸⁰ See, e.g., *id.* at 24-27.

⁸¹ See, e.g., *Don't Water Down the Antiracket Law*, N.Y. Times, July 25, 1986, at A29; *The Thermonuclear Statute*, TIME, April 14, 1986, at 82; *Silencing the Rackets*, BOSTON MAGAZINE, Nov. 1985, at 166.

⁸² See, e.g., *Why RICO Needs Reforming*, Fortune, March 3, 1986, at 109.

⁸³ See, e.g., *Hearings on Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. 8-9 (Oct. 24, 1985) (statement of Priscilla Budeiri, Staff Attorney, Public Citizen's Congress Watch, Concerning Amendments To The Racketeer Influenced and Corrupt Organizations Act, H.R. 2943 and H.R. 2517).

mally would not otherwise attract legal representation.⁸⁴ Alternatively, and perhaps more reasonably and easily done, the civil RICO statute could provide for an award of attorney's fees with no multiple damages. The statute could make clear that those fees, if reasonable, can be awarded without regard to the amount in controversy or the amount ultimately awarded.

In any event, civil RICO as written does not address the egregious cases of fraud that injure the poor and particularly vulnerable in society. To the contrary, its complexity⁸⁵ adds to the disincentives for a contingent fee lawyer to take a civil RICO case. There is no evidence that civil RICO is being used very often in that type of case; it is commonly used as an add-on claim that ups the ante in matters that would be brought to court with or without civil RICO.⁸⁶ The argument that civil RICO is a device that facilitates suits by poor victims of egregious misconduct is suspect at best, since those same plaintiffs already have the potential to collect far more than treble damages in egregious cases through punitive damages.⁸⁷ But, if that is the new rationale for civil RICO, then the current statute is still not the appropriate vehicle to accomplish the goal. Instead, there should be a direct cause of action linked to the plaintiff's vulnerability and to the particularly despicable nature of the defendant's conduct.

The version of this contention voiced by those operating in the public sector is that state and other local public officials need this cause of action to pursue cases of injury to the state or to the state's citizens.⁸⁸ Indeed, political reality may dictate that at least some state officials end up with broader claims than private citizens under a reformed civil RICO.⁸⁹ The irony is that state officials have the least claim upon the extraordinary remedies that civil RICO provides.

84 This would of course eliminate civil RICO's use in large scale product liability and securities cases, where the availability of class actions has promoted not only the availability of legal representation, but specialized plaintiffs' bars.

85 Among the unresolved issues are (1) the relationship between the enterprise and the pattern of racketeering activity, (2) the relationship between the enterprise and the culpable persons, (3) the meaning of "pattern," (4) what is required to say someone is "conducting or participating in the conduct" of the affairs of enterprise through a pattern of racketeering activity, as required under 18 U.S.C. § 1962(c), (5) the nature and extent, if any, of respondeat superior liability, and (6) in cases under 18 U.S.C. § 1962(a), whether the plaintiff must show an injury caused by the investment of proceeds in an enterprise, rather than by the pattern of racketeering activity that generated the proceeds.

86 Indeed, all the evidence is that civil RICO turns up most in securities and other commercial fraud cases that are the staple of the plaintiff's bar. See *Civil RICO Task Force Report*, *supra* note 4, at 53-54.

87 See *supra* notes 66-70 and accompanying text.

88 See, e.g., *Hearings on Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (May 4, 1989) (statement of James E. Long, Commissioner of Insurance, State of North Carolina, representing the National Association of Insurance Commissioners) (state insurance commissioners, acting as receivers for failed insurance companies, need civil RICO to pursue those who committed fraud).

89 S. 438 provides that federal, state, and most local governmental entities would be able to sue for automatic treble damages. Private plaintiffs would have the same opportunity only where the defendant previously had been convicted of an offense for the same conduct. See S. 438, *supra* note 21, at § 4.

Whatever may be true for private individuals, there is no empirical evidence and no logic that supports the claim that state officials need RICO's extraordinary incentives to bring cases against egregious fraud. For instance, it is not credible to suggest that a state insurance commissioner, who is charged with both the general task of protecting the insurance policyholders and insurance system in his or her state⁹⁰ and the specific task of gathering sufficient assets into the estate of a defunct company to protect the policyholders,⁹¹ would not pursue massive, multimillion dollar frauds unless he is provided with the additional allure of multiple damages. Similarly incredible is the notion that state attorneys general would not pursue large frauds against the state without RICO. At the same time, it is irrational and contrary to whatever kernel of federalism remains in our system of government today to say that, where state legislatures have not chosen to give this type of remedy to its state officials for injuries to the state or the state's citizens,⁹² the federal government should step over the state lawmaking process to hand this extraordinary weapon to state governmental entities.

The final branch of this contention is that RICO is needed to create the jurisdictional hook to reign in fly-by-night operators, both in private and state lawsuits. This is the one explanation for civil RICO that makes some sense and which bears some relationship to the bases upon which federal legislation generally rests.

If this is the one rationale that makes some sense, however, the statutory response should be a creature that would look much different than today's civil RICO. In its stead should be a statute that creates jurisdiction in federal court for fraud cases in which the plaintiff makes a threshold showing that the nature of the wrongdoing alleged requires access to federal courts in order for a claim to be brought, because of the interaction of jurisdictional and practical difficulties.

Moreover, it is not clear why plaintiffs would need multiple damages or attorney's fees in those cases. In any case, it is clear once again that it makes no sense for civil RICO to carry all the baggage it has today if this jurisdiction justification is to be the basis for its continued existence.

III. Conclusion: Civil RICO as Currently Structured Is Incapable of Separating the Wheat From the Chaff

Having addressed the case (or lack of a case) for civil RICO, or at least for a statute resembling today's civil RICO statute in any significant way, the issue remains whether there is any hope for solving the

90 *See, e.g.*, COLO. REV. STAT. § 10-1-108(a) (1987): "It is the duty and responsibility of the Commissioner to supervise the business of insurance in this state to assure that it is conducted in accordance with the laws of this state in such a manner as to protect policyholders and the general public."

91 *See, e.g.*, Insurance Commission v. New South Life Ins. Co., 244 S.E.2d 289 (S.C. 1978).

92 A number of states have created "little RICO" statutes, *see, e.g.*, RICO Business Disputes Guide (CCH) ¶ 4000 (27 states have "little RICO" statutes), although they vary to a greater or lesser degree from the federal statute. *See, e.g.*, N.Y. PENAL LAW, title 10, § 460.10.4 (defining "pattern"); ORE. REV. STAT. § 166.715(4) (1985) (same); WIS. STAT. § 946.86(4) (1989 Supp.) (providing for double damages); GA. CODE ANN. § 26-4-6(b) (1971) (providing private parties with equitable relief). Other states have considered such statutes, but not enacted them, or enacted them without private causes of action, *see, e.g.*, N.Y. PENAL LAW, title 10, § 460.00-460.80 (McKinney 1989).

problems created by civil RICO by tinkering with its elements while preserving its basic structure. The answer to that question is also "no."

Those who come to the issue of reforming civil RICO for the first time tend to look to three elements of the statute as potentially fruitful targets of amendments that would "solve" the problem within the basic confines of the statute as it is constructed today. Those three elements are the definitions of "pattern of racketeering activity,"⁹³ and "enterprise"⁹⁴ and the circumstances under which an organization will be held liable.⁹⁵ Each of these paths for effective reform, however, are dead-ends.

First, any definition of "pattern" that preserves the breadth that prosecutors think they need to pursue true organized crime in the ever-changing world will inevitably sweep in most business conduct. Second, any definition of "enterprise" that preserves the breadth that most prosecutors think they need to reach the shifting patterns and varieties of ways that people join together to engage in criminal conduct inevitably will be susceptible to manipulation by competent private attorneys to create "enterprises" out of almost any business situation gone sour. Third, any notion of organizational liability sufficiently broad to prevent evildoers from using an organization as a shield from effectively being held accountable—particularly financially—will leave sufficient room for plaintiffs to reach most business organizations. In addition, as a practical matter, most organizations' sense of responsibility to their employees and principals in most circumstances will cause them to stand behind the accused individual. The plaintiff's bar will know that, and the likelihood is that the attorney will find a way to communicate that fact to the jury. Thus, the dynamics of civil RICO litigation would not likely change much with alterations in direct organizational exposure.

Instead, radical surgery is necessary. The prior-criminal-conviction proposal, with which the civil RICO reform effort began, makes the most sense both in terms of its clarity, its simplicity, and its faithfulness to the notions that underlay the RICO statute in the first place.⁹⁶ But the sausage that is on the table now will at least improve the present plight of the law, and therefore deserves a good defense. An important part of that defense is to insist that the Congress not lose sight of the fact that

93 See 18 U.S.C. § 1961(5) (1988). The courts have read some additional requirements into the "pattern" requirement, but they are not likely to have a significant impact on the availability of civil RICO in litigation arising out of modern business arrangements.

94 See 18 U.S.C. § 1961(4) (1988). Here, too, the courts have used the "enterprise" requirement to place some limits on civil RICO actions. See, e.g., *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984) (necessity of distinction between defendant and RICO "enterprise"), *aff'd on other grounds*, 473 U.S. 606 (1985). These interpretations are also of limited usefulness, particularly since it is so easy to plead an "enterprise" that is an "association-in-fact" of the various entities that the plaintiff wants to sue. See, e.g., *Gerace v. Utica Veal Co.*, 580 F. Supp. 1465 (N.D.N.Y. 1984) (enterprise can consist of nothing more than the sum of the predicate acts).

95 Normal rules of imputed liability apply in civil RICO actions, see, e.g., *Bernstein v. IDT Corp.*, 582 F. Supp. 1079 (D. Del. 1984), although some jurisdictions have recognized certain exceptions to those in the civil RICO rules context. See *Schofield v. First Commodity Corp.*, 793 F.2d 28, 31 (1st Cir. 1986) ("victimized enterprise" not subject to imputed liability).

96 See *Lacovara & Aronow*, *supra* note 37, at 34-47.

the object is to improve a current situation that is unfair to defendants and irrational as a matter of public policy.

In that context, the fact that the sausage may not be a *filet mignon* is not a reason to send it back to the kitchen—and run the risk of not only going hungry, but perhaps starving to death.